Petition

81-2085

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GUIDE PUBLISHING CO.,
t/a JOURNAL AND GUIDE

Petitioners,

v.

CHARLES D. THOMAS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTION PRESENTED

Whether a jury verdict may stand where the jury received no instruction as to the standard of care applicable in a libel suit against a newspaper.

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OPINIONS BELOW

The Petition for Appeal and Petition for Rehearing filed by the Petitioners in the Supreme Court of Virginia were denied without opinion by that court. The orders denying said petitions are set forth in the appendix at pages 1a and 2a.

JURISDICTIONAL STATEMENT

This libel case filed by Charles D. Thomas was tried before a jury in the Circuit Court of the City of Norfolk, Virginia, Judge John P. Harper presiding. The jury returned a verdict in favor of the plaintiff in the amount of $20,000 in compensatory damages and $30,000 in punitive damages. The defendant appealed to the Supreme Court of Virginia which denied the Petition for Appeal on January 13, 1982. Defendant's Petition for Rehearing was denied on March 12, 1982. Jurisdiction over this matter is conferred on this court by 28 U.S.C. § 1257(3) (1976).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

This libel case arose out of the publication of an article in the *Journal and Guide,* a minority owned Norfolk Virginia newspaper, concerning an alleged incident of police misconduct involving the Plaintiff, Charles D. Thomas. The article alleged that one Oswald Harris, a black Vietnam veteran, was the victim of excessive force when Officer Thomas, a white policeman, struck Mr. Harris with a police flashlight without provocation. The article at issue is set forth in its entirety in the appendix at page 3a.

This case is unusual in that it went to trial in the absence of a determination of whether the plaintiff is a public official or a private individual under *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). It is therefore impossible to determine what standard of liability was applied by the court at trial.

It is clear, however, that the court failed to instruct the jury that it could not impose liability without fault.

ARGUMENT

IT IS CONSTITUTIONALLY IMPERMISSIBLE FOR A JURY TO MAKE A FINDING OF LIABILITY AGAINST A PUBLISHER IN A LIBEL SUIT WHERE THE JURY RECEIVED NO INSTRUCTION AS TO THE APPLICABLE STANDARD OF CARE.

In spite of this Court's clear holding in *Gertz* v. *Welch*, 418 U.S. 323 (1974), that prohibits the states from imposing liability without fault in libel cases, the court below failed to instruct the jury concerning the applicable standard of care. The instruction given left the jury free to impose strict liability on the publisher if it found that the other elements of the tort of defamation were present.[1] Instruction 1 states:

> The Court instructs the jury that your verdict must be based on the facts as you find them and on the law contained in all of these instructions.
>
> The issues in this case are:
>
> (1) Did the defendant publish the newspaper article which has been introduced in evidence by the plaintiff?
>
> (2) If the defendant did publish the article, was it seen by someone other than the plaintiff?
>
> (3) Is the article about the plaintiff?
>
> (4) Is the article defamatory?
>
> (5) If the plaintiff is entitled to recover, what is the amount and type of his damages?
>
> On these issues the plaintiff has the burden of proof.
>
> Your decisions on these issues must be governed by the instructions that follow.

It is readily apparent that the trial court's instructions to the jury totally failed to prescribe any standard of fault upon which to base liability. Instruction #1 sets forth the burden of proof required of plaintiff Thomas as consisting of proof of publication, proof that the article concerned the plaintiff, and

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[1] While it is apparent from the record that counsel for the defendant did not object to the instructions at trial, the instructions as given are so contrary to the clear prescription in *Gertz* against strict liability, that the judgment must be reversed on constitutional grounds. See, *Beckley Newspaper Corp.* v. *Hanks*, 389 U.S. 81 (1967); *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 298 n.1 (1966).

proof that the article was defamatory.[2] By failing in its instructions to condition liability upon a specified showing of fault—a standard to be determined by the Court and not left to the jury—the Court's instructions violated the constitutional mandate set forth in *Gertz* v. *Welch,* 418 U.S. 323 (1974).

As this Court held:

> [S]o long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation.

Id. at 347-48. The trial court below failed to instruct the jury in such a manner as to assure that liability be founded upon more than proof of the matters set forth in Instruction 1. That Instruction—the only one which pertains to the plaintiff's case in establishing liability—replicates the now-discarded

> . . . common law position [which] was to impose liability despite the lack of intent, recklessness or negligence on the part of the defendant . . . . In other words, the common law was to the effect that if the defendant was at fault in publishing the statement to a third party and was reasonably understood to defame the other he was subject to liability. This amounted to the imposition of strict liability, or 'liability without fault' with regard to the falsity and the defamatory character of the statement.

Restatement (Second) of Torts § 580B, Comment b (1977).

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[2] The Court did instruct the jury in an abbreviated fashion as to the defenses of truth, and in conclusory terms (Instruction 4) as to the defense of "fair comment" (Instructions 6, 7). Appendix at .

As this Court said in *Gertz* v. *Welch*, 418 U.S. 323, 340 (1974),

> [A] rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship [and . . .] does not accord adequate protection to First Amendment liberties.

One may argue whether the standard of fault should have been actual malice, based either on the plaintiff's status as a public official or on the fact that the publication in question concerned matters of legitimate public interest, see *e.g.*, *Ryder* v. *Times*, 3 Med.L.Rptr. 1170 (D.D.C. 1977) (upholding after the *Gertz* decision the actual malice standard for publications in Virginia on matters of public interest, citing *Sanders* v. *Harris*, 213 Va. 369, 192 S.E.2d 754 (1972) and *Newspaper Publishing Corp.* v. *Burke*, 216 Va. 800, 224 S.E.2d 132 (1976)), or instead simple negligence. *Mills* v. *Kingsport Times-News*, 475 F. Supp. 1005 (W.D. Va. 1979).

Yet there can be no doubt that the trial court failed to give the jury any instruction whatsoever as to the degree of fault which Officer Thomas needed to prove to establish liability.

In essence, the trial court assigned to the defandant the burden of showing that it was not at fault, rather than requiring the plaintiff to establish fault in his case in chief. The jury was instructed that it could find for the defendant only if the article were true or fair comment. Appendix at 6a. Under the court's instructions, the plaintiff was not pressed to establish anything beyond publication and the article's defamatory content. And this type of assignment to a defendant of the burden of disproving what should properly be proved by the plaintiff is precisely what led this Court to overrule the trial court in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

The trial court's failure to properly instruct the jury—notwithstanding defendant's failure to object or proffer a curative instruction on its own—is an error of constitutional magnitude requiring reversal. In *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295 (1966), this Court overturned a jury

verdict against a newspaper even though the defendant had admitted liability at trial. The Court stated:

> The respondent's argument that the newspaper "admitted liability" at trial, and that the constitutional issue of the applicability of *New York Times* v. *Sullivan* . . . is therefore not property before us, must be rejected since both the trial court on motion for new trial and the state appellate court considered and passed upon the constitutional question as though properly raised.

Id. at 298, n.1. The Court went on to hold:

> Yet it is clear that the New York Times test was not applied in the trial of this case. The trial judge himself resolved the issues of publication and falsehood against the newspaper. He then instructed the jury that since the article was "libelous, per se," its only task was to determine damages. Since the respondent was permitted to recover without a finding that the newspaper either knew the article was false or published it in reckless disregard of its truth or falsity, the judgment must be reversed unless there is some basis for saying that the rule of New York Times does not apply to the particular libel in question.

Id. at 300.

The case at bar is remarkably similar to *Damron.* The defendant below failed to object to the instruction and consequently the jury found liability without regard for the constitutional requirements articulated in *Gertz* and *New York Times.* Defendant raised its objections on appeal but its plea was rejected on the procedural ground that it failed to object at trial. See Appendix at 1a. This result is clearly contrary to *Damron,* which stands for the proposition that the constitutional protections for publishers in libel cases cannot be waived as a consequence of procedural oversights. In all cases, the trial court has an affirmative obligation to apply the law as set forth in the decisions of this Court. Liability without fault

was forever abolished in *Gertz* and the court below should have instructed the jury accordingly. This Court cannot allow this deviation from the law of libel to stand.

In many of its facets, the instant case is also similar to *Beckley Newspapers Corp.* v. *Hanks,* 389 U.S. 81 (1967). The trial of that case occurred shortly after the decision of this Court in *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). Although the parties and the court were aware of the "actual malice" standard promulgated in *Sullivan* and further explained in subsequent Supreme Court cases, the jury was given instructions which this Court found to be "clearly impermissible." In reversing a verdict for the plaintiff, this Court stated:

> Although this action was tried subsequent to the decisions of this Court in *New York Times Co.* v. *Sullivan,* 376 U.S. 244 [and its progeny], and despite the fact that it was recognized at trial that the principles of *New York Times* were applicable, the case went to the jury on instructions which were clearly impermissible. The jury was instructed in part that it could find for the respondent if it were shown that petitioner had published the editorials "with bad or corrupt motives," or "from personal spite, ill will or a desire to injure plaintiff." Because petitioner failed to object to this erroneous interpretation of *New York Times* at trial, and in fact offered instructions which were themselves inadequate, the issue of these instructions is not before us. However, since it is clear that the jury verdict was rendered upon instructions which misstated the law and since petitioner has properly challenged the sufficiency of the evidence, we have undertaken an independent review of the evidence "so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

398 U.S. 81-2 (citations omitted).

In the instant case it is equally clear that "the jury verdict was rendered upon instructions which misstated the law . . ." and impermissibly allowed the jury to render a verdict on the basis of strict liability. Therefore, this Court should grant the Petition for Certiorari in order to review the instructions to the jury to insure that they comply with the constitutional edicts of *New York Times* v. *Sullivan* and its progeny and *Gertz* v. *Robert Welsh, Inc.*

CONCLUSION

Because of the substantial issue of constitutional law involved in this case, Petitioner respectfully requests that the Petition for Certiorari to the Supreme Court of Virginia be granted.

Respectfully submitted,

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Appendix

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday ***the*** 13th ***day of*** January, 1982.

The Guide Publishing Co., Inc.,
t/a, etc., Appellant,

against Record No. 810410
Circuit Court No. L79-1888/L2356-80

Charles D. Thomas, Appellee.

From the Circuit Court of the City of Norfolk

Because error was not preserved by contemporaneous objection as to question Nos. I, II, and the constitutional aspects of No. III, and finding no reversible error in the judgment complained of, as to the remaining claims, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday ***the*** 12th ***day of*** March, 1982.

The Guide Publishing Co.,
Inc., t/a, etc., Appellant,

against Record No. 810410
Circuit Court No. L79-1888/L2356-80

Charles D. Thomas, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 13th day of January, 1982, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

He'd 'Been Leading A Quiet Life'

Brutality Victim Faces Charges

By Phil Wilaylo

NORFOLK—Oswald Harris doesn't smile much anymore. The right side of his forehead is numb. He has no muscle control on that part of his face. The crown of his skull is still sore and his teeth are still pained and numb, over a month since he was hit full in the face with a long-handled flashlight swung by a Norfolk cop.

About 3:30 a.m. on September 30 Harris was having an argument with a friend in the 9600 block of Shore Drive in Norfolk. Evidently someone had called the police, because as Harris was leaving the apartment on his way home, he saw two white cops approaching. As Harris was walking around them, Officer C. D. Thomas suddenly grabbed him by the shoulders, swung him around, and without warning hit him in the face with his flashlight.

"To this day," Harris told the *Guide* this week, "I do not know why I was hit. I wasn't threatening the officer, I wasn't arguing with him, I wasn't armed. This has really messed me up and it has put a bitterness in my heart."

After being taken to DePaul Hospital where he received over 20 stitches in his forehead and mouth, Harris was taken to police headquarters where he was booked for disorderly conduct and resisting arrest. His trial comes up on November 22 in Norfolk District Court.

"I spent six years in the Navy," said the 34 year-old warehouse worker. "I was wounded in Vietnam. I was in the presidential honor guard in Washington. I've been leading a quiet life, trying to make something of my life, and then this happens. This is my hometown. I've been all over the world and come back and some guy busts me in the head."

Oswald Harris is not the first black person in Norfolk to have to ask, "Why did it happen?" after being assaulted by the police, and he probably won't be the last. The question will stay in his mind for the rest of his life, as long as the three-inch scar remains on his forehead, a reminder of how some police officers still treat black people in Virginia.

INSTRUCTION NO. 1

The Court instructs the jury that your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

(1) Did the defendant publish the newspaper article which has been introduced in evidence by the plaintiff?

(2) If the defendant did publish the article, was it seen by someone other than the plaintiff?

(3) Is the article about the plaintiff?

(4) Is the article defamatory?

(5) If the plaintiff is entitled to recover, what is the amount and type of his damages?

On these issues the plaintiff has the burden of proof.

Your decisions on these issues must be governed by the instructions that follow.

INSTRUCTION NO. 2

The Court instructs the jury that "Actual malice" is that malice which shows that a statement was made with reckless disregard of whether it is false or not.

INSTRUCTION NO. 3

The Court instructs the jury that a statement is defamatory if people in the community understand the words in it, in their normal usage, to mean that the plaintiff is unfit to perform the duties of his employment and/or plaintiff lacks integrity in performing the duties of his employment and/or that the effect of the words is prejudicial to the plaintiff in his work.

INSTRUCTION NO. 4

The Court instructs the jury that if you believe from a preponderance of the evidence that the statement concerning the plaintiff published by the defendant was substantially true in the ordinary and usually accepted meaning thereof, then you shall find your verdict in favor of the defendant.

INSTRUCTION NO. 5

The Court instructs the jury that while the burden is on the plaintiff to prove his case by a preponderance of the evidence, nevertheless as to the defense of truth relied upon by the defendant, the burden is on the defendant to prove, by a preponderance of the evidence, that the plaintiff brutalized and/or maliciously wounded Oswald Harris.

INSTRUCTION NO. 6

The Court instructs the jury that the defendant newspaper had the right, common with every other citizen, to comment fairly and honestly upon and criticize the conduct of the plaintiff in his treatment of Norfolk Citizens for the reason that it was a matter of public concern; and if the jury believe from the evidence that the article sued on did not exceed the limits of fair and honest comment, as defined in another instruction of the Court, then the defendant is not liable, and you shall find your verdict in favor of the defendant.

INSTRUCTION NO. 7

The Court instructs the jury that by the words, fair and honest comment or criticism, is meant, such comment or criticism as was reasonably justified by the facts and circumstances as they then existed.

INSTRUCTION NO. 8

The Court instructs the jury that if you find that the plaintiff is entitled to recover, then in determining the amount of damages to which he may be entitled, you shall take into

consideration all the facts and circumstances of the case as disclosed by the evidence, the nature and character of the charges, the language in which they are expressed, the occasion on which they were published, the extent of their circulation, the probable effect upon those to whose attention they came, and their natural and probable effect upon the plaintiff's business, personal feelings, and his standing in the community in which he lives; and, if under the other instructions herein he is entitled to recover, you should award him such sum by way of damages as will fairly and adequately compensate him,

1. For any loss or injury to his business, and

2. For the insult to him, including any pain and mortification and mental suffering inflicted upon him, and

3. For any injury to his reputation as a man and citizen.

INSTRUCTION NO. 9

The Court instructs the jury that Compensatory Damages include both General and Special damages.

"General" damages are those which the law presumes to be the natural, proximate and necessary result, of the defamation itself, and in order to recover such general damages it is not necessary for the plaintiff to prove pecuniary loss.

"Special" damages are such as in fact have actually occurred as the result of the natural consequence of the defamation itself, and in order to recover such special damages the plaintiff must prove pecuniary losses.

INSTRUCTION NO. 10

The Court instructs the jury that if you find that the plaintiff is entitled to recover, and if you believe from clear and convincing evidence that the acts complained of were influenced by actual malice, he may in addition to compensatory damages, recover punitive or exemplary damages against the defendant; that is to say, the jury will not be limited in the amount of its verdict against the defendant for any compensatory damages sustained by the plaintiff, but they may give

him such further damages against the defendant as they may think right, in view of all the circumstances of the case, as a punishment of the defendant and as a salutary example to others, to deter them from offending in a like manner.

In determining whether the defendant was influenced by actual malice, the jury should consider the relation of the parties to each other, the acts of the defendant before and after the alleged use of such insulting words, and all the circumstances surrounding them.

Opposition

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Docket No. 81-2085

In the Supreme Court of the United States

October Term, 1981

GUIDE PUBLISHING CO.
Petitioners,

CHARLES D. THOMAS,
Respondent.

BRIEF OF RESPONDENT THOMAS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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B. PETITIONER'S QUESTIONS PRESENTED TO VIRGINIA SUPREME COURT IN PETITION FOR WRIT OF ERROR 4a

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ABSENCE OF JURISDICTION

Pursuant to Rules of the Supreme Court 21(h), the alleged federal question was not timely and properly raised so as to give this Court jurisdiction to review the judgment. Jurisdiction is absent under 28 USC §1257(3) as the federal right asserted in question presented in the Petition was never " . . . specially set up or claimed . . ." so that there was a final decision by the highest state court in which a decision could be had. There was never any decision on the alleged federal issue by any state court.

STATEMENT OF THE CASE

Patrolman Charles D. Thomas (Respondent) and Patrolman Greenia answered a call that a lady was being beaten. They found Oswald Harris beating this lady and Harris would not obey the patrolmen's directions. Both on the day of the incident and on the day of trial, November 22, 1978, Harris apologized to Patrolmen Thomas and Greenia and thanked them for stopping him before anyone was seriously injured. Harris was convicted of disorderly conduct and resisting arrest. Harris' criminal trial was about eight (8) weeks after the arrest of September 30, 1978, but the Petitioner did not wait for this trial, but printed their false article on November 17, 1978. No one from the Guide interviewed either officer. The free-lance reporter, Mr. Wylayto, untrained in journalism, the alleged source of the false story, was never called to testify at the libel trial by the Guide; nor did Harris testify at the libel trial. Petitioner's

editor, Ms. Reid, knew that Harris had been charged with crimes scheduled for trial, but intentionally chose not to wait for trial, but printed the article a few days before. The editor, Reid, acknowledged that such an article would sell more newspapers, wrote the headline, knew the article was designed to attract readers, and agreed that such a sensational story and headline would enhance sales. The editor, Ms. Reid, herself, never talked to Harris, was not aware that Harris had apologized to the officers, did not have anyone at Harris' trial, did not direct anyone from the Guide to interview the patrolmen, never talked to the female being assaulted by Harris, or have anybody do so, never talked nor had anyone talk to the paramedics at the scene, never tried to find out what the sworn testimony at the criminal trial was, never was interested in a follow-up article after Harris' convictions, and never printed a retraction of the false article. Dr. Milton Reid, publisher of the Guide, testified that Patrolman Thomas should have been interviewed before the article was printed.

This cause was brought under the Virginia libel and defamation law and under the Virginia Statute of Insulting Words, Va. Code §§8.01-45 et seq.

Guide never claimed in Answer or at any time at trial, that Officer Thomas was a public figure, never offering instruction to this effect. This issue was not raised after jury verdict in any written post-trial motions.

More significantly, the question that the Petitioner attempts to raise in Petition for Writ of Certiorari herein, was never raised at the trial, no instructions were proffered to the court on this issue, and this issue was not mentioned in post-trial motions. Moreover, the sole issue that Guide presents to the United States Supreme Court was never raised in the Petition for Writ of Error to the Supreme Court of Appeals of Virginia. The questions Guide did raise are found in the attached appendix herein. The Supreme Court of Appelas of Virginia denied Guide's petition for Writ of Error on these questions presented. For the first time, in a Petition for Rehearing, on the denial of Petition for Writ of Error, Petitioner raised the issue that it brings to this court. The Court of Appeals of Virginia has never passed on this issue, as the Petition for Rehearing was denied and the issue was never heard. Thus, in actuality, the question presented never having been decided by any state court below, is presented for decision for the first time to the United State Supreme Court.

ARGUMENT

I. THERE IS NO JURISDICTION TO CONSIDER THE PETITION

There is no jurisdiction under 28 USC §1257(3) as the question presented herein was first raised in Petition for Rehearing of the Virginia Supreme Court's denial of a Writ of Error. The Petition for Rehearing was denied and the Virginia Supreme Court never passed on the substance of the Petition. Directly on all fours is Forbes v. State Council of Virginia, 216 US 396 (1910), where identical to the

instant case, the Petitioner attempted, for the first time, to introduce a federal question into the record by Petition for Rehearing to the Virginia Supreme Court and the Virginia Court denied the rehearing petition "after mature consideration." The Forbes court held that this amounted to no more than a denial of the Petition, and did not show that the federal question was considered or passed on; therefore, there was no basis for jurisdiction in the Supreme Court of the United States.

Directly apposite, also, is Cardinale v. Louisiana, 394 US 437, 438-439 (1969):

> "In Crowell v. Randell, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c.20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391."
>
> * * *
>
> "In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 USC §1257, there are sound reasons for

this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground."

II. THERE IS NO GOOD REASON TO GRANT REVIEW.

Herein, there is no conflict with any decision of this Court, and there is no important question of federal law to decide.

Herein, the jury was instructed clearly on the definition of actual malice before they could grant punitive damages (Instructions 2, 10). The jury found Guide liable on a more stringent standard, clear and convincing evidence of malice, than Guide so belatedly suggests is the proper standard of liability.

In Ocala Star-Banner Company v. Damron, 401 US 295, 299 n.3 (1966), the Court found that the federal constitutional question was expressly presented to the trial and appellate court in that case:

> " . . . both the trial court on Motion for New Trial, and the State Appellate Court considered and passed on a constitutional question . . ."

Herein, neither the trial court nor the Court of Appeals of Virginia decided the question raised herein by Petitioner.

The tone and tenor of the article published by THE JOURNAL AND GUIDE exhibited reckless disregard for the truth. The article states that Thomas is guilty of the commission of a serious crime, malicious wounding, a felony punishable by up to 20 years in prison. The article is not couched in language of "It is alleged" or "Harris said"; rather the article states that Officer Thomas "brutalized" and, without provocation, wounded Harris. Guide's editor testified that the headline was designed to attract readers and encourage them to buy newspapers; that the more sensational the headline and the story, the more papers sold.

In Herbert v. Londo, 441 US 153, 162 n.8 (1979), the Court indicated that malice may be shown by " . . . direct as well as circumstantial evidence, going to the mental state of the defendant." In discussing malice, the Court indicated relevant any evidence as follows:

> "This showing, in turn, hinged upon the intent or purpose with which the publication was made . . ." 441 US 164 (emphasis added)

The veracity of Harris was completely doubtful, as Harris was accused of crimes and his version of the incident (if his version of the incident) was incredible, considering his self-interest involved.

In United States v. Davis, 617 F.2d 667, 694 (D.C. Cir. 1979), the Court stated as follows:

> "In St. Amant v. Thompson, 390 US 727, 88 S.Ct. 1323, 20 Law Ed. 2d, 262 (1968), cited with approval in Herbert v. Londo, 441 US 153, 156, 99 S.Ct. 1635, 1639, 60 Law Ed. 2d 115 (1979), the Court observed that reckless disregard for the truth requires a showing that the defendant 'in fact entertained serious doubt as to the truth of its publication.' Id. at 731, 88 S.Ct. at 1325. This subjective test may be met not only by showing actual deliberation but also by demonstrating that there existed 'obvious reasons to doubt the veracity of the informant or the accuracy of his report.' Id. at 732, 88 S.Ct. at 1326 (emphasis added)."

Recently, in Rebozo v. Washington Star Co., 49 L.W. 2553 (5th Cir. 2/19/81), the Court held:

> " . . . the fact that Kessler (the reporter) resolved the uncertainty expressed in it in such a way as to cast Rebozo in the worst possible light and to make for Kessler a front-page story, could amount to evidence of the reporter's reckless disregard."

Showing actual malice "might be achieved by proof that (defendant) in fact had no reliable sources, that he mis-

represented the reports of his sources, or that reliance upon those particular sources was reckless." Carey v. Hume, 492 F.2d 631, 636 (D.C. Cir.), cert. dismissed, 417 US 938 (1974).

In Ciaci v. New Times Publishing Company, 639 F.2d 54, 61, 63 (2nd Cir. 1980), the Court stated (citing Gertz at 418 US 323, 39-40):

> "There is not constitutional value in false statements of fact. . . No First Amendment protection enfolds false charges of criminal behavior . . ."

CONCLUSION

There is no jurisdiction to consider the Petition. There is no good reason to grant review. It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Ralph Rabinowitz

Appendix

VIRGINIA: IN THE CIRCUIT COURT FOR
THE CITY OF NORFOLK

CHARLES D. THOMAS,

Plaintiff,

vs. LAW NO.
L79-1888

THE GUIDE PUBLISHING CO., INC.
t/a JOURNAL & GUIDE,

Defendant.

MOTION FOR A NEW TRIAL

NOW comes the above styled defendant, Guide Publishing Co., Inc., by counsel, and moves the Honorable Court for an Order granting a new trial on all issues presented in the above matter, or in the alternative a new trial on the issue of damages only, following the trial of this matter on November 12, 1980, for the following reasons and upon the following grounds:

1. The jury verdict and award of damages are contrary to the law and evidence adduced at trial.

2. The award of twenty thousand dollars compensatory damages to plaintiff is excessive, shocking to the conscience and demonstrably unfair to defendant, in light of the evidence, including but not limited to evidence that plaintiff suffered absolutely no pecuniary loss as a result of defendant's alleged libel.

3. The jury award of thirty thousand dollars in punitive damages is contrary to the law and the evidence in that plaintiff failed to produce clear and convincing evidence of actual malice on the part of defendant in publishing the allegedly libelous

news article.

4. The jury award of thirty thousand dollars in punitive damages is excessive, shocking to the conscience and demonstrably unfair to defendant, in light of evidence presented at trial that defendant acted in good faith in publishing the allegedly libelous news article and that defendant is a small weekly newspaper with limited assets and circulation.

5. The jury verdict violates defendant's privilege to comment fairly upon plaintiff and his activities as a matter of legitimate public concern and, as a matter of law, defendant may not be held liable for such comment.

6. The Court refused to grant defendant's jury instruction "A", and said instruction would have properly instructed the jury that a number of circumstances should have been considered as mitigation of plaintiff's alleged damages.

7. Plaintiff's counsel improperly argued to the jury that the amount sued for in plaintiff's Motion for Judgment could be considered by the jury as a guide or measure in computing plaintiff's damages.

8. Defendant has discovered new evidence, previously unavailable in that post-trial publicity regarding this matter has brought to light family relations of Oswald Harris, a material and key witness, who has now been located in Missouri, but even in the exercise of due diligence could not be located prior to the previous trial in this matter.

WHEREFORE, defendant prays that it be granted a new trial.

GUIDE PUBLISHING CO., INC.

By_____
Of Counsel

William P. Williams
BABALAS & WILLIAMS, P.C.
210 Atlantic National
Bank Building
415 St. Paul's Boulevard
Norfolk, Virginia 23510

CERTIFICATE

I HEREBY CERTIFY THAT A TRUE COPY OF THE FOREGOING MOTION WAS MAILED TO O.L. GILBERT, RABINOWITZ, RAFAL & SWARTZ, 309 WEST BUTE STREET, P.O. BOX 3332, NORFOLK, VIRGINIA 23514, COUNSEL FOR PLAINTIFF, THIS 17th DAY OF NOVEMBER, 1980.

_____p.d.

B. PETITIONER'S QUESTIONS PRESENTED TO VIRGINIA SUPREME COURT IN PETITION FOR WRIT OF ERROR

I. Did the trial court err in failing to determine as a matter of law whether or not respondant was a public official for the purposes of applying the New York Times v. Sullivan standard of liability?

II. Did the trial court properly apply the correct law regarding "public officials" in instructing the jury as to the proper test of liability?

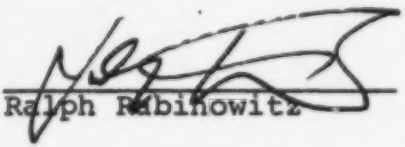
III. Were the damages awarded by the jury clearly excessive?

IV. Did the trial court err in refusing to grant the defendant's proffered Instruction #12?

V. Did the trial court err in failing to grant the Petitioner a new trial on the grounds of after discovered evidence?

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief of Respondent Thomas in Opposition to Petition for Writ of Certiorari were mailed, postage pre-paid, to Arthur B. Hanson and Arthur D. McKey, HANSON, O'BRIEN, BIRNEY & BUTLER, 888 Seventeenth Street, N. W., Suite 1000, Washington, D. C., 20006, and John B. Mann, BABALAS, LEVIT & MANN, Fifth and Franklin Streets, Richmond, Virginia, 23219, counsel for Petitioner, this 27th day of May, 1982.



Ralph Rabinowitz

Amicus Brief

MOTION FILED
JUN 7 1982

No. 81-2085

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GUIDE PUBLISHING CO., INC.
t/a JOURNAL AND GUIDE,
Petitioner,

v.

CHARLES D. THOMAS,
Respondent.

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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CHARLES D. THOMAS,

Respondent.

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter "ANPA") respectfully moves this Court for leave to file the accompanying Brief Amicus Curiae in support of the Petition for Writ of Certiorari filed herein. Although the attorneys for Petitioner have consented to ANPA's filing of a brief amicus curiae, the Respondent has withheld his consent to such a filing.

ANPA is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States. The Journal and Guide and thirty-six other newspapers published in various parts of Virginia hold membership in ANPA.

Concerned with issues of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members informed of, and to provide meaningful input on, matters touching on these concerns. The Association's member newspapers, individually and through ANPA, are ever vigilant to protect the First Amendment rights of free speech and free press and thereby to further the public's interest in dissemination of information concerning the activities of government and matters of public interest.

The jury verdict in the instant case was rendered in the absence of any instructions on the applicable standard of care and also in the absence of any instruction or decision from the trial judge as to the constitutional status of the libel plaintiff. These are errors of constitutional magnitude which require review by this Court.

New York Times v. *Sullivan*, 376 U.S. 254 (1964), established that libel cases (at least those in which there is a media defendant) are always subject to constitutional scrutiny to ensure that "the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" *Id.* at 272, *quoting NAACP* v. *Button*, 371 U.S. 415 (1963). *New York Times* established that the First Amendment required the application of the "actual malice" test in libel cases brought by "public officials." Subsequent cases in this Court extended that doctrine to "public figures," and finally, in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court held that, even in libel cases brought by "private individuals," the Constitution mandates the application of some standard of fault and prohibits recovery on the basis of strict liability. This Court also has held that because the determination of a libel plaintiff's status has constitutional implications, the issue of status is a matter which must be decided by the trial judge. *Rosenblatt* v. *Baer*, 383 U.S. 75, 88 (1966).

The jury verdict in the instant case is constitutionally impermissible due to the trial court's failure to determine the plaintiff's status and failure to instruct the jury as to the applicable standard of care. If such verdicts are permitted to stand, there would result a significant adverse impact on the

law of libel as established by this Court and in particular on media defendants including the members of ANPA. For these reasons, ANPA wishes briefly to set forth its views for the assistance of the Court.

WHEREFORE, the American Newspaper Publishers Association requests this Court to grant this motion and permit ANPA to file the brief amicus curiae attached hereto.

Respectfully submitted,

W. Terry Maguire

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IN THE

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t/a JOURNAL AND GUIDE,
Petitioner,

v.

CHARLES D. THOMAS,
Respondent.

BRIEF AMICUS CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") submits this brief amicus curiae in support of Petitioner's, Journal and Guide, Petition for Writ of Certiorari.

INTEREST OF THE AMICUS CURIAE

As set forth in its motion for leave to file this brief, ANPA has a significant concern for insuring that the First Amendment guarantees of free speech and free press shall not be abridged. This Court, in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), established a constitutional privilege mandated by the First Amendment, which is applicable to libelous publications concerning "public officials." Under *Sullivan*, a libel plaintiff who is a "public official" must prove that the defendant

published with "actual malice" in order to recover in defamation litigation. In *Rosenblatt* v. *Baer*, 383 U.S. 75 (1965), the Court also established that the classification of libel plaintiffs as public officials/public figures or private individuals was a constitutional question resolvable only by the court. And in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court held that the Constitution prohibits recovery by private figure libel plaintiffs on the basis of strict liability.

In the case presented for review, the trial court failed to make any ruling as to the constitutional status of the plaintiff, although, as a police officer, he was clearly a "public official" under the decisional authorities of this Court. The trial court compounded this error by failing to give the jury any instruction as to the appropriate standard of care by which the jury could measure the newspaper's possible liability. As a result, the jury was permitted to return a verdict solely on the basis that the newspaper had published an article concerning the plaintiff and that the article was false and defamatory. Under the instructions given to the jury, the newspaper could have prevailed only by persuading the jury that the article was true. In *New York Times Co.* v. *Sullivan, supra*, this Court expressly held that a rule protecting only true publications "is inconsistent with the First and Fourteenth Amendments." *Id.* at 279.

Because the trial court's instructions, or lack thereof, fall so far short of constitutional requirements, ANPA desires to present to this Court, for its assistance, ANPA's views in respect to the important issues placed before this Court by the Petition for a Writ of Certiorari.

ARGUMENT

Although it appears that the Petitioner newspaper failed to seek a ruling as to the constitutional status of the plaintiff, or an instruction as to the proper fault standard applicable to the defendant's publication, the constitutional requirement that the standard of liability in a libel case be prescribed by the trial court according to the status of the plaintiff is not dependent upon exacting compliance with the rules of practice and

procedure in a given state. A waiver of constitutional privilege is not lightly to be presumed. *See generally, Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967); *c.f., New York Times* v. *Conner,* 365 F.2d 567 (5th Cir. 1966). As this Court observed in *Butts, supra* at 145:

> When the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom [of expression], we are unwilling to find waiver in circumstances which fall short of being clear and compelling.

In *Hormel* v. *Helvering,* 312 U.S. 552 (1941), this Court addressed an objection to the Eighth Circuit Court of Appeals' consideration of issues not raised at trial. Justice Black—in overruling that objection and himself addressing the question alleged to have been waived at trial—said:

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Id. at 557.

Had the trial court, as required by the Constitution, determined the status of the plaintiff, it would have been required to conclude that the plaintiff was a "public official." The decisional authorities of this Court and of numerous state and federal courts leave no doubt that law enforcement officers must be considered public officials within the purview of *New York Times* v. *Sullivan,* at least when the allegedly libelous publication comments upon the plaintiff's qualifications or performance as a public official. Here the plaintiff is a police officer in the City of Norfolk, Virginia, and the article complained of purported to describe certain actions he took under color of his authority as a police officer.

Since *New York Times*, it has been judicially recognized that police officers bear a unique responsibility to the public. They are charged with the gravest public trust—that of enforcing the law. Their acts are the quintessence of state action, affecting the public on the most immediate level. They are required to apprehend suspects. Most are armed and they are all too frequently called upon to utilize physical force in the line of duty. Their conduct directly affects the lives of the people of their communities. They clearly "have or appear to have, substantial responsibility for the conduct of government affairs." *Rosenblatt* v. *Baer*, 383 U.S. 75, 85 (1965).

Perhaps the strongest and most articulate judicial statement concerning the public official status of police officers appears in *Gray* v. *Udevitz*, 656 F.2d 588, 591 (10th Cir. 1981):

> We agree with the trial court that Gray's status as a police officer in Rock Spings made him a public official. Street level policemen, as well as high ranking officers, qualify as public officials under the test of *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966). They "have or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs," *Id.* at 85, and their position "has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond general public interest in the qualifications and performance of all government employees . . ." *Id.* at 86. The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss. The strong public interest in ensuring open discussion and criticism of his qualifications and job performance warrant the conclusion that he is a public official.

The decision of the Tenth Circuit Court of Appeals is in accord with the vast majority of pertinent reported cases and makes it clear that the trial court should have held that the plaintiff was a "public official" and should have so instructed the jury.

Even in the absence of a determination of the plaintiff's status, however, the trial court had a constitutional obligation pursuant to *Gertz* to provide the jury with instructions as to the minimum standard of liability that the libel plaintiff must prove. As the Petitioner has pointed out, the trial court provided the jury with only one instruction as to the elements of a cause of action for libel, and that instruction utterly fails to indicate a standard of care.

New York Times v. *Sullivan*, 376 U.S. 254 (1964), and its progeny firmly established that, in the context of public official/public figure libel suits, the First Amendment mandated that a libel plaintiff prove that a publisher acted with "actual malice." Subsequent to *New York Times*, however, many states continued to apply common law rules of strict liability for libelous publications where the plaintiffs were "private individuals." This Court, in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), required that the states abandon that common law rule, but permitted them to adopt any standard of conduct for cases of defamation of "private individuals" so long as the standard did not provide for liability without fault.

As a result of *Gertz*, it is clear that libel judgments based on a finding of liability without fault may not be permitted to stand. Yet, in the instant case, that is precisely what occurred. The newspaper was forced, due to the lack of an instruction as to the standard of care, to attempt to convince the jury that the publication was true in order to avoid the imposition of liability. *Gertz* explicitly holds that this is constitutionally impermissible:

> [A] rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship [and . . .] does not accord adequate protection to First Amendment liberties.

Id. at 340.

The trial court's instructions, or lack of proper instructions, served to turn this case over to the jury:

> upon the common law principle of presumed damages. It essentially told the jury that the newspaper could be held liabile without fault. Under *Gertz*, whether plaintiffs were private persons, public figures, or public officials, the instructions were clearly erroneous.

Newspaper Publishing Corp. v. *Burke*, 224 S.E.2d 132, 135 (Va. 1976).

Although it appears that no objection was made to the constitutional infirmity of the instructions submitted to the jury, this Court may, nevertheless, address that issue due to the First Amendment values at stake and the requirements of fundamental justice. As the Petitioner has pointed out, because of the constitutional aspects of libel law, this Court, in the past, has reviewed erroneous instructions in the absence of technical compliance with the rules of preservation of error at the trial level. *See, Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81 (1967), *Ocala Star-Banner* v. *Damron*, 401 U.S. 295 (1966).

CONCLUSION

Because of the constitutional magnitude of the errors committed by the trial court and for the reasons stated herein and those advanced by the Petitioner, *Journal and Guide*, it is respectfully urged that the Petition for a Writ of Certiorari to the Virginia Supreme Court be granted.

Respectfully submitted,

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